Appendix

ESTATE OF ANNA R. MORISON

N. Y. Law Journal, October 26, 1943, Pages 1087-1088.

FOLEY, SURROGATE:

The petitioners seek the filing of a compulsory account by the testamentary trustee. After the return of citation, the latter moved to dismiss the proceeding on the pleadings. The general grounds raised by the trustee as a basis for the relief sought are that an action was begun in the Supreme Court, New York County, by the trustee, and all of the persons interested in the trust, including the petitioners, were made parties. The trust under the will had terminated. A construction of the will as to the vesting of the remainders was asked, together with the judicial settlement of the trustee's account. The question of interpretation was determined by an interlocutory judgment which was affirmed on appeal by the Appellate Division (*Bank of N. Y. as trustee of Morison*, &c., v. *Kaufman*, 26 N. Y. S., 2d. 474, aff'd. 261 App. Div. 818; leave to appeal denied 285 N. Y. 855). An account and supplemental account were filed.

Final judgment in the action was rendered on August 27, 1941, in which the accounts were judicially settled, and directions made for distribution of certain of the assets to each of the petitioners; and the plaintiff trustee was released and discharged from "all further liability, responsibility or accountability with respect to all matters embraced in this accounting". A small amount was held in reserve for contingent liability for taxes.

Pursuant to this judgment distribution was made, and the reserve fund ultimately distributed to the parties entitled to it upon their giving the requisite receipts. The petitioners in this proceeding, in effect, attempt to

open the issues and the final judgment entered in the action. During the greater period of the pendency of the action the petitioners had been represented by a firm of attorneys who withdrew shortly before the entry of final judgment. New counsel appears to have subsequently represented the petitioners; but they signed and acknowledged a formal consent to the entry of the final judgment. The motion to dismiss the compulsory proceeding is granted upon the ground that such judgment is conclusive and may not be collaterally attacked (*Crouse* v. *McVickar*, 207 N. Y. 213).

There is not the slightest basis in law for the contention of the petitioners that the Surrogate's Court has exclusive jurisdiction over the account of the trustee. Concurrent jurisdiction is vested in the Supreme Court (*Matter of Runk*, 200 N. Y., 447; *Colson* v. *Pelgram*, 259 N. Y. 370; *Matter of Malloy*, 278 N. Y. 429). It was within the discretion of the petitioners to have applied to the Supreme Court to have the matter transferred to the Surrogate's Court as a matter of comity (*Matter of Runk, supra; Bloomingdale* v. *Bloomingdale*, 258 App. Div. 231). They failed to do so. It is the general rule that where separate actions or proceedings have been instituted between parties in reference to the same matter in courts having concurrent jurisdiction, "the court which first obtains jurisdiction with adequate power to administer full justice should continue to exercise it". (*Coulson* v. *Pelgram*, *supra*, at p. 275.) In the estate here involved, by continuing as parties to the action, the petitioners are concluded by the judgment. If fraud or newly discovered evidence or other grounds for the vacatur of that judgment is claimed, the attack upon it must be made by a direct application to the Supreme Court (*Crouse* v. *McVickar, supra*).

Submit order on notice dismissing the compulsory proceeding accordingly.